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AN ANALYSIS OF DOING BUSINESS—Part II*

By Elcanon Isaacs

Service of Process

To understand why the transaction of business should have become the test for the legality of service on a foreign corporation, it is important to examine briefly the historical development of such service. The early law did not recognize that a personal judgment could be obtained against a foreign corporation[100] except possibly for attachment,[101] because a personal judgment is without validity against a non-consenting non-resident.[102] There must be something corporate to serve within the jurisdiction, as in a suit for attachment, there is physical property.

To meet the difficulty raised by this situation two methods of approach were devised, one holding that the corporation by entering and doing business in a state is physically present,[103] and the other holding that the foreign corporation by entering a state and doing business therein is deemed to have consented that service may be made on it.[104] The first of these, although approved by most writers,[105] was foreclosed to the Supreme Court of the United States by the rule laid down in Bk. of Augusta v. Earle,[106] that a corporation cannot exist outside of the sovereignty where it is created. The Supreme Court, therefore, adopted the second theory in Lafayette Ins. Co. v. French,[107] holding more fully in St. Clair v. Cox,[108] that if a state permits a foreign corporation to do business within its limits and at the same time provides that in suits against it for business done there, process shall be served on its agents, corporations that subsequently do business are to be deemed to assent to such conditions as fully as though they had specially authorized their agents to receive service of process.[109]

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(100) Peckman v. North Parish in Haverhill (Mass. 1834) 16 Pick. 274.

(101) Bushel v. Commonwealth Ins. Co. (1827) 15 Serg. & R. 173; cf. McQueen v. Middletown Mfg. Co. (N. Y. 1819) 16 Johns. 5.

(102) Pennoyer v. Neff (1877) 95 U. S. 714.

(103) Moulin v. Trenton Mutual Life Ins. Co. (1853) 24 N. J. 222; (1855) 25 N. J. L. 57.

(104) Lafayette Ins. Co. v. French (U. S. 1855) 14 How. 404. In Smolik v. Phila & Reading Coal & Iron Co. (S. D. N. Y. 1915) 222 Fed. 148, a foreign corporation doing business in a state was held in an opinion by Judge Hand to have consented to the appointment of an agent to accept service on a cause of action arising outside the state, not because it was present or had consented, but because it had done business voluntarily and could therefore be treated as if it had consented. Fead, Jurisdictions over Foreign Corporations (1926) 24 Mich. Law Rev. 633, 636.

(105) See Henderson, The Position of Foreign Corporation in American Constitutional Law (1918) 90; Cahill, Jurisdiction over Foreign Corporation (1917) 30 Harvard Law Rev. 676, 691.

(106) (U. S. 1839) 13 Pet. 519.

(107) Supra, footnote 103.

(108) Supra, footnote 6.

(109) "States cannot by their legislation confer jurisdiction upon the courts of the United States, neither can consent of parties give jurisdiction when the facts do not; but both State legislation and consent of the parties may bring about a state of facts which will authorize

Since in service on a corporation two elements are necessary,[110] the transaction of business and agents through whom the corporation can be reached,[111] the Supreme Court was also constrained to hold under the consent theory that the agent on whom the service is made must bear such a relation to the corporation as to sustain the conclusion that he had power to receive such service.[112] In carrying out this principle the court has held on causes of action arising within the states, service may be made on (a) an agent duly consented to,[113] (b) a representative agent,[114] (c) a public official consented to,[115] and (d) a public official not consented to.[116] On causes of action arising outside the state, service may be made on (a) an agent duly consented to,[117] (b) possibly a representative agent,[118] (c) a public official duly consented to,[119] but (d) not on a public official not consented to.[120] We shall now disregard the element of the agent and consider only the doing of business.

An analysis of the cases discloses considerable conflict because of the two lines of historical development. In the earlier cases in the Supreme Court of the United States, the consent theory is applied. In the later case, the theory of the corporate presence is fully adopted. In one case, which marks the transition, an attempt is made to combine both theories.

The former rule is stated in St. Louis, S. W. R. v. Alexander:[121]

" . . . In a general way it may be said that the business must be such in character and extent as to warrant the inference that the corporation has subjected itself to the jurisdiction and laws of the district in which it is served and in which it is bound to appear when a proper agent has been served with process."

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the courts of the United States to take cognizance of a case." Ex parte Schollenberger (1877) 96 U. S. 369, 377.

In Barrow Steamship Co. v. Kane (1898) 170 U. S. 100, 18 Sup., Ct. 526, however, the Supreme Court held that no statute was necessary to permit suits in personam against a foreign corporation doing business. It is maintained by writers, (see supra, footnote 105), as a result that the Supreme Court has abandoned the consent theory and adopted the theory of the corporate presence. See infra.

(110) Cf. Farmers' & Merchants' Bk. v. Federal Reserve Bk. (D. Ky. 1922) 286 Fed. 566.

(111) In New York, in Pope v. Terre Haute Car & Mfg. Co. (1881) 87 N. Y. 137, and in North Carolina, in Jester v. Baltimore Steam Packet Co. (1902) 131 N. C. 54, 42 S. E. 447, it was held that service could be made on a foreign corporation whose officer or agent was present in the state incidentally or resided there even though the corporation did no business. The Supreme Court of the United States had held to the contrary in St. Clair v. Cox, supra, footnote 6, in Goldey v. Morning News (1894) 156 U. S. 518, 15 Sup. Ct. 559, and in Conley v. Mathieson Alkali Works (1903) 190 U. S. 406, 23 Sup. Ct. 728, but the rule in these states was not changed until the decision in Riverside & Dan River Cotton Mills v. Menefee (1914) 237 U. S. 189, 35 Sup. Ct. 579, expressly overruling the North Carolina cases. Dollar Co. v. Canadian Car & Foundry Co. (1917) 220 N. Y. 270, 115 N. E. 711.

(112) Connecticut Mutual Life Ins. Co. v. Spratley (1899) 172 U. S. 602, 19 Sup. Ct. 308.

(113) Cf. Pennsylvania Fire Ins. Co. v. Gold Issue Mining Co. (1917) 243 U. S. 93, 37 Sup. Ct. 344.

(114) Connecticut Mutual Life Ins. Co. v. Spratley, supra, footnote 112; Commercial Mutual Accident Co. v. Davis (1909) 213 U. S. 245, 29 Sup. Ct. 445.

(115) Cf. Pennsylvania Fire Ins. Co. v. Gold Issue Mining Co. supra, footnote 113.

(116) Mutual Reserve Fund Life Association v. Phelps (1913) 190 U. S. 147, 23 Sup. Ct. 707.

(117) Smolik v. Phila & Reading Coal & Iron Co., supra, footnote 104; Bagdon v. Phila. & Reading Coal & Iron Co. (1916) 217 N. Y. 432, 111 N. E. 1075; cf. Mitchell Furniture Co. v. Selden Breck Co. (1921) 257 U. S. 184, 42 Sup. Ct. 84.

(118) Reynolds v. Missouri K. & T. Ry. (1917) 228 Mass. 584, 117 N. E. 913; aff'd (1921) 255 U. S. 565, 41 Sup. Ct. 446; Fry v. Denver & R. G. R. Co. (N. D. Cal. 1915) 226 Fed. 893; Takacs v. Philadelphia & R. Ry. (S. D. N. Y. 1915) 228 Fed. 728; Lipe v. C. C. & O. Ry. (1922) 123 S. C. 515, 116 S. E. 101, with an extensive note in (1923) 30 A. L. R. 248; cf. Davis v. Farmers' Co-operative Equity Co. (1923) 262 U. S. 313, 43 Sup. Ct. 558; Atchison, T. & S. F. Ry. v. Weeks (C. C. A. 5th Cir. 1918) 254 Fed. 513, certiorari denied (1919) 249 U. S. 602, 39 Sup. Ct. 259; and Tauza v. Susquehanna Coal Co., supra, footnote 54; see Scott, Fundamentals of Procedure in Actions at Law (1922) 55.

(119) Pennsylvania Fire Ins. Co. v. Gold Issue Mining Co., supra, footnote 113.

(120) Old Wayne Mutual Life Ins. Co. v. McDonough (1906) 204 U. S. 8, 27 Sup. Ct. 236; Simon v. Southern Ry. (1915) 236 U. S. 115, 35 Sup. Ct. 255.

(121) Supra, footnote 69, p. 227.

The later rule was stated in International Harvester v. Kentucky,[122] in which the court said:

"We are satisfied that the presence of a corporation within a state necessary to the service of process is shown when it appears that the corporation is there carrying on business in such a sense as to manifest its presence within the state. . . ."

These decisions were decided a little over one year apart and it may be noted that Mr. Justice Day in both cases delivered the opinion of the court.

The second rule has been consistenly followed by Mr. Justice Brandeis who, in Phila. & Reading Ry. Co. v. McKibbin, said:[123]

"A foreign corporation is amenable to process to enforce a personal liability, in the absence of consent, only if it is doing business within the state in such manner and to such extent as to warrant the inference that it is present there."

That a conflict exists in the two lines of decisions is recognized in People's Tobacco Co. v. Amer. Tobacco Co.,[124] where an attempt is made by Mr. Justice Day to combine both rules:

"The general rule deducible from all our decisions is that the business must be of such nature and character as to warrant the inference that the corporation has subjected itself to the local jurisdiction, and is by its duly authorized officers or agents present within the state or district where service is attempted." The Alexander and McKibbin cases are both cited.

Thereafter, however, the test of presence alone has been applied to the activities of foreign corporations in the decisions.[125] These illustrate the drift from the consent theory to the theory of corporate presence as the ground for suits *in personam* against foreign corporations. Finally in the recent case of Bk. of America v. Whitney Bk.,[126] the court said:

"The jurisdiction taken of foreign corporations, in the absence of statutory requirement or express consent, does not rest upon a fiction of constructive presence, like *qui facit per alium facit per se.* It flows from the fact that the corporation itself does business in the state or district in such a manner and to such an extent that its actual presence there is established."

In other words, a new criterion for the transaction of business by a foreign corporation so as to subject it to service of process has been recently adopted, and as different criteria will, no doubt, result in different conclusions,[127] the authority of the earlier cases is vitiated.

Accepting, however, presence as the basis for service of process on foreign corporations, we find the question arising as to whether this test is susceptible of analysis so that in the absence of a decision on identical facts the officers of a corporation may guide themselves with reasonable assurance, or whether the question is a matter of immediate experience with the courts? On what ground was liability to service in Bogert & Hopper v. Wilder Mfg. Co.,[128] predicated where the secretary and treasurer of a Pennsylvania corporation attended a toy manufacturers' fair in New York, maintained an exhibit in a hotel room,

(122) Supra, footnote 35, p. 589; Green v. Chicago, B. & Q. R. R., supra, footnote 77.

(123) (1917) 243 U. S. 264, 265, 37 Sup. Ct. 280.

(124) Supra, footnote 69, p. 87.

(125) Rosenberg Co. v. Curtis Brown Co., supra, footnote 67.

(126) Supra, footnote 50, p. 173; Cannon Mfg. Co. v. Cudahy Packing Co. (U. S. 1925) 45 Sup. Ct. 250.

(127) Cf. International Harvester v. Kentucky, supra, footnote 35, with Green v. Chicago, B. & Q. R. R., supra, footnote 77.

(128) Supra, footnote 66.

and took orders for merchandise which were sent to the home office in Philadelphia? On what ground was service held invalid in Rosenberg Co. v. Curtis Brown Co.,[129] in which a foreign corporation purchased a large part of its merchandise in New York, sometimes by correspondence and sometimes through visits to New York of one of its officers?

Many objections will, no doubt, arise to this latest attempt to deal with an existing fact by means of fixed legal categories,[130] because the courts are applying a principle developed in connection with a tangible person to a legal entity which is incorporeal, and whose existence can only be gauged by the effect it has on persons and things.[131] Nevertheless, it would appear that the difficult fiction of the implication consent has been eliminated, and with it the uncertainty of service on agents, to whose power to receive service the corporation has not consented.

At least one new difficulty, however, has already appeared.[132] Under the consent theory, service was held valid on foreign corporations which ceased to do business if the cause of action arose within the state before the withdrawal.[133] Such service can no longer be made because the corporation will no longer be present when service is attempted.[134] How this situation will be met is difficult to see. The reasons which led to the decision of the Phelps case are still just as cogent under one theory as under the other.

Taxation

The tax to be considered in connection with the transaction of business by a foreign corporation is not a tax on the property of the corporation,[135] nor is it a tax on the franchise to be a corporation because that franchise does not exist out of the state granting it,[136] but it is a tax on the franchise to do business,[137] which is separate and distinct.[138] When a state imposes a tax upon corporations, as to domestic corporations it can be considered a tax on the franchise to be a corporation, but as to foreign corporations the tax is imposed solely on business.[139] In New York, it takes two forms, one a license fee made upon and for the granting of the privilege of doing business[140] and the other a franchise tax upon the privilege granted when and as exercised.[141] Limitations on taxes of

(129) Supra, footnote 67.

(130) See Calvert Magruder and Roger S. Foster, Jurisdiction over Partnerships (1924) 37 Harvard Law Rev. 793, 826.

(131) In the recent case of Cannon Mfg. Co. v. Cudahy Packing Co., supra, footnote 125, it was held that ownership of all the stock of a local subsidiary corporation by a foreign corporation does not warrant the inference that the latter is present in a jurisdiction so as to be subjected to service of process. This decision is of importance because many corporations which do business in a number of states have adopted the device of organizing either a separate subsidiary corporation for each state entered or one subsidiary corporation of small capitalization to do all foreign business.

(132) See Scott, op. cit., footnote 118, p. 55, n.

(133) Mutual Reserve Fund Life Asso. v. Phelps (1902) 190 U. S. 147, 23 Sup. Ct. 707.

(134) People's Tobacco Co. v. Amer. Tobacco Co., supra, footnote 69; cf. Hunter v. Mutual Reserve Life Ins. Co. (1910) 218 U. S. 573, 31 Sup. Ct. 127; Chipman, Ltd. v. Jeffery Co. (1920) 251 U. S. 366, 40 Sup. Ct. 172.

(135) Adams Express Co. v. Ohio State Auditor (1897) 166 U. S. 185, 17 Sup. Ct. 604.

(136) People v. Equitable Trust Co. (1884) 96 N. Y. 388.

(137) London & San Francisco Bk. v. Block (C. C. Cal. 1902) 117 Fed. 900.

(138) Memphis & Little Rock R. R. v. Railroad Commissioners (1884) 112 U. S. 609, 5 Sup. Ct. 299.

(139) People v. Equitable Trust Co., supra, footnote 61.

(140) Tax Law (Laws 1909, c. 62) § 181.

(141) Ibid., § 182.

this nature are found in Allen v. Pullman's Palace Car Co.,[142] where it is held that the privilege tax must be limited to business done within the taxing state, and in this case and in W. U. Teleg. Co. v. Kansas,[143] it is held that the tax must not be an interference with interstate commerce. In Southern Ry. v. Greene,[144] a foreign corporation entered upon business in Alabama, paid both license and property taxes and was then subjected to an additional tax for the privilege of doing business. Domestic corporations of a similar character were not required to pay this tax and the court held that the additional burden denied to the corporation equal protection of the laws.

The liability of the foreign corporation to assessment must be determined from the actual character of the business carried on and not from the existence of unexercised powers reserved to it.[145] It makes no difference whether the charter powers are fully employed or not because the question is what the corporation does, not what it can do.[146] For that reason a corporation which leases all its property and thereafter merely maintains its corporate existence is not deemed to be doing business under a franchise tax law.[147] The Bell Telephone Company, a Massachusetts corporation, which was authorized by its charter to manufacture, own, sell, use, and license telephone instruments was held not to be doing business in New York by licensing the use of telephones but leaving the transportation and utilization of them to local corporations.[148]

In the imposition of franchise taxes, the question of assessability has also arisen in connection with corporations which are holding companies and whose activity is, therefore, different from that, previously considered, of corporations which merely own shares of stock in a local company. In Rhode Island Hospital Trust Co. v. Rhodes,[149] a holding company which in addition to holding stock, collected rents was held to be doing business. A similar conclusion was reached in Commonwealth v. Wilkes-Barre & H. R. Co.,[150] where the foreign corporation held directors' meetings, kept its bank account and the residence of its treasurer within the state, and received dividends on securities.

Perhaps a differentiation should be made between the nature of business which will make a corporation liable under franchise taxes, such as have been considered, and license or excise taxes on doing business. In People ex rel. Manila El. R. R. & L. Co. v. Knapp,[151] however, where the difference between the two is referred to, no distinction is made. For present purposes the test developed under the one can be applied to the other.

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(142) (1903) 191 U. S. 171, 24 Sup. Ct. 39; Looney v. Crane (1917) 247 U. S. 178, 38 Sup. Ct. 85.

(143) (1910) 216 U. S. 1, 30 Sup. Ct. 190; International Paper Co. v. Massachusetts (1918) 246 U. S. 135, 38 Sup. Ct. 292; Alpha Portland Cement Co. v. Massachusetts (U. S. 1925) 45 Sup. Ct. 477.

(144) (1910) 216 U. S. 400, 30 Sup. Ct. 287.
See Elcanon Isaacs, The Federal Protection of Foreign Corporations, 26 Col. Law Rev. 263, 283 (1926).

(145) People v. Amer. Bell Teleph. Co. (1889) 117 N. Y. 241, 22 N. E. 1057. But see People ex rel. Wall and Hanover Street Realty Co. v. Miller (1905) 181 N. Y. 328, 334, 73 N. E. 1102.

(146) Chile Copper Co. v. Edwards (S. D. N. Y. 1923) 294 Fed. 581.

(147) Cf. People ex rel. Lehigh & New York R. R. v. Sohmer (1916) 217 N. Y. 443, 112 N. E. 181.

(148) People v. Amer. Bell Teleph Co., supra, footnote 145.

(149) (1914) 37 R. I. 141, 91 Atl. 50.

(150) (1915) 251 Pa. 6, 95 Atl. 915; cf. United States v. Nipissing Mines Co. (C. C. A. 2d Cir. 1913) 206 Fed. 431.

(151) Supra, footnote 51.

In Cheney Bros. Co. v. Massachusetts,[152] the activities of seven corporations on which an excise tax had been levied, were examined. In all instances the question was whether the business done was protected as interstate commerce and so not in the scope of this discussion. In the Copper Range Case,[153] however, a description of certain activities is of value:

"This is a Michigan corporation whose articles of association contemplate that it shall have an office in Boston. It is a holding company and owns various corporate stocks and bonds and certain mineral lands in Michigan. Its activities in Massachusetts consist in holding stockholders' and directors' meetings, keeping corporate records and financial books of account, receiving monthly dividends from its holdings of stock, depositing the money in Boston banks and paying the same out, less salaries and expenses, as dividends to its stockholders three or four times a year. The exaction of a tax for the exercise of such corporate faculties is within the power of the state."

A series of cases arose under the Corporation Tax Law[154] in which the Supreme Court of the United States has considered the nature of activities which make a corporation subject to the excise tax provided for therein. This law imposes a special excise tax with respect to the carrying on or doing business by corporations and certain other organizations. In the first, Flint v. Stone-Tracy Co.,[155] the court defined business as that which occupies the time, attention, and labor of men for the purpose of livelihood or profit and in applying this definition to the facts, said:

"We think it is clear that corporations organized for the purpose of doing business and actually engaged in such activities as leasing property, collecting rents, managing office buildings, making investments of profits, or leasing ore lands and collecting royalties, managing wharves, dividing profits, and in some cases investing the surplus, are engaged in business within the meaning of this statute, and in the capacity necessary to make such organizations subject to the law."

In three cases which followed, Zonne v. Minneapolis Syndicate,[156] McCoach v. Minehill & Schuylkill Haven R. R.,[157] and United States v. Emery,[158] it was decided that the holding of title to real estate which was leased did not make the corporation liable to the tax.[159] Where, however, the corporation did more than this, as in Von Baumbach v. Sargent Land Co.,[160] it sold quantities of real estate and stumpage, incurred expenses for explorations and employed another company to oversee the leases, it became subject to the tax. We see here a principle developing which will no doubt be utilized in ascertaining whether a foreign corporation is subject to license or franchise taxes.[161] Perhaps a significant fact is that the rule was evolved from the interpretation of the federal and not from the state statutes.

"It is evident, from what this court has said in dealing with the former cases, that the decision in each instance must depend upon the particular facts before

(152) Supra, footnote 71.

(153) Supra, footnote 71, p. 155.

(154) Revenue Act of August 5, 1909, c. 6 § 38, 36 Stat. 112, U. S. Comp. Stat. (1916) 2280.

(155) (1910) 220 U. S. 107, 171, 31 Sup. Ct. 342.

(156) (1911) 220 U. S. 187, 31 Sup. Ct. 361.

(157) (1913) 228 U. S. 295, 33 Sup. Ct. 419.

(158) (1915) 237 U. S. 28, 35 Sup. Ct. 499.

(159) Anderson v. Morris & E. R. Co., supra, footnote 55. West End St. Ry. v. Malley (C. C. A. 1st Cir. 1917) 246 Fed. 625.

(160) (1917) 242 U. S. 503, 516, 37 Sup. Ct. 201.

(161) People ex rel, Manila El. R. R. & L. Co. v. Knapp, supra, footnote 51. Cf. Chile Copper Co. v. Edwards, supra, footnote 146.

the court. The fair test to be derived from a consideration of all of them is between a corporation which has reduced its activities to the owning and holding of property and the distribution of its avails and doing only the acts necessary to continue that status, and one which is still active and is maintaining its organization for the purpose of continued efforts in the pursuit of profit and gain and such activities as are essential to those purposes."

In other words, presence may be the test for service of process, but activity is the test for taxation.

QUALIFICATION

Under qualification may be included statutes requiring corporations as a condition of doing business to register by filing a copy of their charter or articles of incorporation with the secretary or other officer of the state,[162] to pay license fees or taxes,[163] to appoint an agent on whom process may be served,[164] to designate and maintain one or more places of business in the state,[165] to take out a license or permit of authority to do business,[166] to file statements of financial condition,[167] to keep books and records in the state and to permit them to be inspected,[168] to deposit securities with some officer of the state for the protection of those who do business with the corporation.[169]

Since failure to comply with these conditions may prevent a corporation from commencing or maintaining actions[170] and may subject the corporation or its agents to penalties,[171] or even may make stockholders or officers personally liable for liabilities contracted in the state in violation of the statute,[172] a higher degree of doing business has been set up as a criterion for not paying taxes imposed as a condition precedent, or not appointing an agent, than that which will subject a corporation to service of process or taxation after business is done. The corporation may come within the latter purposes by its activities and yet not be barred from commencing or maintaining an action.

The difference referred to here is illustrated by the fact that conditions precedent for doing business involving the appointment of an agent for service of process, and the payment of taxes are a burden on interstate commerce,[173] but taxation, left to the ordinary modes of collection,[174] and service of process[175] may not be.

On the general subject, there are a number of cases which have become landmarks. One which has exerted a wide influence is Butler Bros. Shoe Co. v.

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(162) Diamond Glue Co. v. United States Glue Co., supra, footnote 8.

(163) Pembina Consolidated Silver Mining & Milling Co. v. Pennsylvania (1888) 125 U. S. 181, 8 Sup. Ct. 737; People ex rel. Manila El. R. R. & L. Co. v. Knapp, supra, footnote 51.

(164) Commercial Mutual Accident Co. v. Davis (1909) 213 U. S. 245, 29 Sup. Ct. 445.

(165) Oliver Co. v. Louisville Realty Co. (1913) 156 Ky. 628, 161 S. W. 570, 51 L. R. A. (N. S.) 293.

(166) Paul v. Virginia, supra, footnote 3.

(167) Heard v. Pictorial Press (1903) 182 Mass. 530, 65 N. E. 901.

(168) Henry v. Babcock & Wilcox Co. (1909) 196 N. Y. 302, 89 N. E. 942.

(169) Noble v. Mitchell (1896) 164 U. S. 367, 17 Sup. Ct. 110.

(170) St. Avit v. Kettle River Co. (C. C. A. 8th Cir. 1914) 216 Fed. 872.

(171) Oakland Sugar Mill Co. v. Wolf Co. (C. C. A. 6th Cir. 1902) 118 Fed. 239.

(172) Taylor v. Branham (1895) 35 Fla. 297, 17 So. 552; Ryerson & Son v. Shaw (1917) 277 Ill. 524, 115 N. E. 650.

(173) International Textbook Co. v. Pigg, supra, footnote 34; Crutcher v. Kentucky, supra, footnote 17.

(174) St. Louis Southwestern Ry. v. Arkansas (1914) 235 U. S. 350, 35 Sup. Ct. 99; International Textbook Co. v. Tone (1917) 220 N. Y. 313, 115 N. E. 914.

(175) International Harvester v. Kentucky, supra, footnote 35 and this footnote.

United States Rubber Co.[176] The United States Rubber Company, a New Jersey corporation, appointed The Butler Bros. Shoe Company, a local corporation in Colorado, its agent to sell, and agreed to consign to it at Denver certain goods from its mill and warehouse. The Shoe Company in return agreed to receive the goods and assume the risk thereof, to pay freight and expenses of handling, to make advances if requested, to guarantee the Rubber Company against all losses from sales to the extent of profits received, to pay certain agreed prices at specified times, to keep separate accounts, to bill goods to the purchaser as consignee and agreed further that the income derived from the sales should be the property of the consignor. The Shoe Company made a default in payment whereupon the Rubber Company brought suit. To this a defense was set up that the Rubber Company had not qualified to do business in Colorado. The court held that under the facts the contract was not a conditional sale but a contract of factorage and asks whether such a contract is prohibited by the laws of Colorado. To answer this question it would seem necessary, according to the analysis outlined in International Textbook Co. v. Pigg,[177] to decide first and foremost whether a contract of factorage amounts to doing business in the state. The court, however, omits this step and enters into an extended discussion of the principle that a state cannot burden interstate commerce even when such commerce is carried on by corporations. In fact, the cases cited by counsel which have some bearing on the subject, namely, Diamond Glue Co. v. United States Glue Co.,[178] and Chattanooga Building & Loan Ass'n. v. Denson,[179] were ruled out because they did not consider this matter. The conclusion that is finally reached is that the contracts and activities in question are protected from state interference by reason of their interstate nature. In other words, the court having apparently assumed that a factorage contract involves doing business within a state, which may not be the case,[180] decides that such business is nevertheless interstate commerce, and is, no doubt, burdened by the interference. This would seem to dispose of the question. But the court goes further and finds that the state constitution and statute were not meant to burden interstate commerce, so that after all no business was done within the meaning of the laws in question. The court, no doubt, came to a correct conclusion, but in a strange and diverse way.

The basis of the numerous cases on construction and installation of apparatus or fixtures as affected by qualification was laid in Diamond Glue Co. v. United States Glue Co.[181] although this case did not concern the questions in particular. In these cases, a foreign corporation agrees to construct a building or install fixtures or machinery. It does not qualify to do business because once the particular work it has undertaken is completed, it may never enter the state again. When, however, it brings suit for the contract price in case of a dispute it finds that it may not be able to recover.[182]

(176) Supra, footnote 46.

(177) Supra, footnote 34.

(178) Supra, footnote 8.

(179) Supra, footnote 73.

(180) Cf. Mitchell Wagon Co. v. Poole (C. C. A. 6th Cir. 1916) 235 Fed. 817.

(181) Supra, footnote 8.

(182) Oliver Co. v. Louisville Realty Co., supra, footnote 165.

In the basic case, the Diamond Glue Company agreed to supervise plans for a glue factory to be built by the United States Glue Company and to supervise and operate the factory after it was built. After this contract was entered into, Wisconsin passed a law requiring foreign corporations to register before doing business. This the Diamond Glue Company did not do, and the defendant refused to perform further. The court held that the activities of the plaintiff constituted doing business and that the plaintiff not having qualified, the defendant was excused from performing its part. It may be noted that the court did not discuss the effect of the failure to qualify on the maintenance of the suit.

There is, however, a line of construction and installation contracts in which the decisive question is not whether business is done but whether the contracts are protected as being interstate commerce. In York Mfg. Co. v. Colley,[183] a Pennsylvania corporation without having qualified to do business in Texas sold and delivered an ice plant in that state and sent an engineer, who was assisted by mechanics paid by the purchaser, to install it. The erection took three weeks and a test of the apparatus a week more. The court held that the transaction was one of interstate commerce, that the provisions as to the expert were germane thereto and did not involve doing local business. In Buffalo Refrigerating Mach. Co. v. Penn H. & P. Co.[184] on the other hand, a foreign corporation was denied a recovery on its contract because it did not register after purchasing parts and installing a refrigerator plant. The court held that such activities never involved commerce, that while a manufacturing company which performed the same acts would be protected by the Federal Constitution, an engineering company which did the same would not be so protected because its business is not to carry on commerce.

It is apparent, therefore, that the question of doing business may arise antecedently to interstate commerce, perhaps never involving it, or subsequently thereto. This distinction is pointed out in In re Springfield Realty Co.,[185] where a Wisconsin corporation installed a system of automatic sprinklers in Detroit for a Michigan corporation, without having qualified to do business under a Michigan statute. When the Michigan corporation became bankrupt the foreign corporation was not allowed to recover, the lower court saying:

"It must be borne in mind that the contract in question does not provide for the sale of an article in interstate commerce under an agreement containing a clause to the effect that the seller shall install the article in the state to which it is to be sent. This contract provides merely for the furnishing and installation of certain apparatus in a certain building in the state of Michigan, without any provision for the prior transportation of such apparatus from outside into this state. Therefore the cases are not here applicable, which distinguish between intrastate transactions and interstate commerce in contracts providing, not only for the sale and installation of articles, but also for the transportation of such articles from one state to another."

This court points out that the mere fact that in performing the contract material and labor was brought from outside the state will not make the transaction one of interstate commerce. In other words, in cases in which a foreign corporation simply installs an apparatus, the primary question of doing business

(183) (1918) 247 U. S. 21, 38 Sup. Ct. 430.

(184) C. C. A. 3d Cir. 1910) 178 Fed. 696.

(185) (E. D. Mich. 1919) 257 Fed. 785, 788, aff'd. (1918) 262 Fed. 341, certiorari denied 253 U. S. 579, 40 Sup. Ct. 344.

may be answered in the affirmative, but the second question on interstate commerce does not arise. Where, however, the corporation both sells and installs the apparatus the problem to be considered is whether commerce has terminated.[186] In Browning v. City of Waycross,[187] a salesman who took orders for lightning rods for a foreign corporation and installed them after they were delivered, was held to be doing local business and liable for a tax. Such business is subsequent to interstate commerce. These cases are, therefore, not within this discussion because the point involved in them is not that of doing business.[188]

It may seem that the distinction between business antecedent to interstate commerce and business subsequent thereto, is a verbal one and of no importance, but what do we find courts doing? We find them applying the tests for the existence of interstate commerce, such as the original package doctrine,[189] to determine whether a corporation is doing business, tests which may be applicable in the one case but only a source of confusion in the other.

The outstanding authority on the subject of qualification is International Textbook Co. v. Pigg.[190] The condition imposed in this case as a prerequisite of doing business by a foreign corporation was the filing of a report containing certain information. The court seems to distinguish at least two legal purposes, namely, filing a statement of information and registration and to place the requirement in question in the same category as registration. The corporation, The International Textbook Company, was incorporated under the laws of Pennsylvania and was the proprietor of what is known as The International Correspondence Schools at Scranton, Pennsylvania. It prepared instruction papers, textbooks and illustrative apparatus and sent them to students by mail. It also employed local agents to secure students and collect deferred payments on scholarships. These activities, the court held, were doing business.

"Its transactions in Kansas, by means of which it secured applications from numerous persons for scholarships, were not single or casual transactions, such as might be deemed incidental to its general business as a foreign corporation, but were parts of its regular business continuously conducted in many states for the benefit of its Correspondence Schools." (p. 104.)

The court found further, however, that while business was transacted, such business was commerce which was interstate and which was burdened by the requirement of the Kansas statute.

The importance of this case lies in its analysis of the question of doing business, and its methodological discussion. It stands out among the other cases on the subject as exceptional. What is unfortunate is, that while it has been frequently cited, it has not been followed.

In summary we may say: The business which must be transacted by a foreign corporation to permit service of process must be such as to warrant the inference that the corporation is *present*. To subject such a corporation to taxation for doing business, the transactions must not only show that the corporation is present but also that it is *active*. In order that qualification be rendered necessary, the corporation must not only be present and active, but its activity must be *continuous*.

(186) Andrews Co. v. Colonial Theatre Co. (E. D. Mich. 1922) 283 Fed. 471.
(187) Supra, footnote 4.
(188) See for further discussion Elcanon Isaacs, Activity Subsequent to Interstate Commerce, 25 Michigan Law Rev.—(April, 1927).
(189) Watkins Medical Co. v. Williams (1916) 124 Ark. 539, 187 S. E. 653.
(190) Supra, footnote 34, p. 104.

THE WAR DEBTS

The agitation for a reconsideration of the War Debts Settlement has resulted in the formation of an organization which will probably give the matter much prominence. There is a dispute as to the facts as well as the justice of exacting the payments now claimed. The matter bids fair to engage the public attention again and provoke more controversy than ever before. Lawyers who may be called upon for discussions or addresses on the subject will be interested in the announcement of a series of articles in the Kiawanis Magazine (which, so far as we know, is not connected with the above-mentioned organization) beginning March, 1927, on the facts and various phases of the War Debts Settlement problem. The first four articles, by Miss Alice S. Cheyney, prepared from data secured from the Institute of Economics, Washington, D. C., will merely present the facts without arguments. Following these there will be articles by Professor Hollander of Johns Hopkins University, Congressman Burton of Ohio, Professor Patterson of Pennsylvania University, Professor Seligman of Columbia University and Dr. Moulton, Director of the Institute of Economics, Washington, D. C.

THE NEW UNITED STATES CODE

The final official publication of the new United States Code is now being issued and may be obtained from the Supt. of Documents at Washington, D. C. for $4.00. The Code proper covers 1705 pages. Following this are: separate parallel reference tables to the Revised Statutes (1878), to the Statutes at Large (Vols. 19-44), to the U. S. Compiled Statutes Annotated, and to the Federal Statutes Annotated; a table of statutes repealed prior to Dec. 7th, 1925; the Declaration of Independence, Articles of Confederation, Ordinance of 1787, Constitution of U. S. with Amendments, Index to Constitution and Amendments, and an appendix containing the general and permanent laws of the first session of the 69th Congress. A 325-page index concludes the volume.

BOOK REVIEW

JONES' COMMENTARIES ON THE LAW OF EVIDENCE. Second Edition. By James M. Henderson. San Francisco: Bancroft-Whitney Co. 1926. Six Volumes. pp. lxxx, 5719.

These commentaries need no introduction to the legal profession. The first edition promptly became the standard work on evidence, familiar to every actively practicing lawyer. In this second edition the text has been revised, the later cases included, and three new chapters added. One new chapter concerns the evidentiary aspect of pleading. Another deals with experimental evidence. The third has to do with evidence wrongfully obtained, or that acquired by illegal search and seizure or other methods outside the law. The subjects of the latter two chapters, in particular, are of comparatively recent development, and this new text will prove unusually valuable. While the general order and arrangement of the earlier work has been preserved, the sections and in some instances chapters of the original edition have been subdivided, to the end that titles and catch-lines may reflect the specific matter contained in each and make the contents of the work more accessible. In all respects it is even superior to its predecessor.

This six-volume new edition constitutes the most comprehensive text on the law of evidence, and to the trial practitioner it would seem to be indispensable.

"The driver's seat was crowded with children. Standing alone, this circumstance would not be proof of negligence, but the practice is inexcusable and to be highly condemned. The operator should be free in body, arms, hands, and mind to control his car." Frank v. Cohen, 135 Atl. 624, Pa.

RECENT CASES

HOSPITAL NOT LIABLE FOR WRONGFUL DELIVERY OF PATIENT'S PROPERTY TO IMPOSTER

The plaintiff alleged that having been severely injured by a street car, she was taken to the defendant hospital by a police officer in a taxicab and that the hospital undertook by agreement to safely keep the valuable jewelry which she had on her person, and return it to her; and that in violation of that contract defendant failed and refused to return it on demand. There was no allegation of negligence.

The hospital for defense alleged that it was a public, charitable organization, not for profit, was without capital stock, never had nor could declare dividends, was conducted for accommodation of sick and injured persons, was always conducted at a loss, the deficit being made up by gifts and bequests; that its funds were derived from benevolent persons, except such moneys as might be received from persons able to pay; and that those not able to pay were taken care of as public charity.

It was conceded that the jewelry was deposited with defendant and afterward delivered by a hospital employee, without authority or consent of plaintiff, to some imposter representing himself to be plaintiff's son-in-law. On the above facts the trial court gave judgment for defendant on the pleadings and statements of counsel. The Supreme Court of Ohio, in Rudy v. Lakeside Hospital, 155 N. E. 126, affirmed the judgment, in the following opinion:

PER CURIAM. In her statement of claim the plaintiff relied upon an implied contract by way of bailment as a predicate for recovery. It contained no specific allegations of negligence, and it is contended that she had the right to sue either in tort for a negligent delivery, or for a breach of the bailment contract.

If this were a case of contract purely, one not involving wrongful conduct on the part of the institution's employee, liability might attach. But this case presents a different aspect and is based upon an unauthorized and negligent delivery to an impostor.

There is a wide divergence of opinion in the various jurisdictions of this country regarding the liability of charitable institutions whose funds are provided by benevolences. 11 Corpus Juris, pp. 374-377. This court has held that a public charitable hospital is not liable for injuries to a patient resulting from the negligence of one of its employees. Taylor, Adm'r, v. Protestant Hospital Ass'n, 85 Ohio St. 90, 96 N. E. 1089, 39 L. R. A. (N. S.) 427. The only exception to the foregoing principle made by this court is that such charitable hospital is required to use reasonable care in the selection of its physicians, nurses, or attendants, in order to avoid liability for their negligence. Taylor v. Flower Deaconess Home and Hospital, 104 Ohio St. 61, 135 N. E. 287, 23 A. L. R. 900. In the first Taylor Case, supra, there was also an effort to base liability upon a contractual relation arising from the acceptance by the hospital of the injured plaintiff as a pay patient; however, that phase of the case did not create a liability upon the part of the hospital, in the view of this court.

Under the theory of nonliability of charitable institutions adopted by this court, as heretofore indicated, we are unable to make any distinction between cases involving damages to the person of a patient and damages to his property, where such are caused by the wrongful act of an employee. We therefore affirm the judgment of the Court of Appeals, upon the authority of the two Ohio cases cited.

Judgment affirmed.

PENNSYLVANIA STATUTE PROHIBITING THE USE OF "SHODDY" HELD UNCONSTITUTIONAL

The Legislature of Pennsylvania passed an act regulating the manufacture and sale of bedding. Among its provisions was the stipulation that no shoddy should be used in the making or repairing of bedding. Violations of these provisions were punishable by fine or imprisonment.

Suit was brought to enjoin enforcement of the act on grounds that it is repugnant to the due process and equal protection clauses of the Fourteenth Amendment.

The lower court found that, in so far as it absolutely prohibits the use of shoddy in comfortables, it invades constitutional rights.

On appeal Mr. Justice Butler of the Supreme Court of the United States in Weaver v. Palmer Bros. Co., 46 Sup. Ct. 320, said:

"The record shows that annually many million pounds of fabric, new and secondhand, are made into shoddy. It is used for many purposes. It rewoven into fabric, made into pads to be used as filling material for bedding, and is used in the manufacture of blankets, clothing, underwear, hosiery, gloves, sweaters, and other garments. The evidence is to the effect that practically all the woolen cloth woven

in this country contains some shoddy * * *

"It is established that sterilization eliminates the dangers, if any, from the use of shoddy. As against that fact, the provision in question cannot be sustained as a measure to protect health; and the fact that the act permits the use of numerous materials, prescribing sterilization if they are secondhand, also serves to show that the prohibition of the use of shoddy, new or old, even when sterilized, is unreasonable and arbitrary. * * *

"The business here involved is legitimate and useful; and, while it is subject to all reasonable regulation, the absolute prohibition of the use of shoddy in the manufacture of comfortables is purely arbitrary, and violates the due process clause of the Fourteenth Amendment."

Mr. Justice Holmes dissented from the majority of the court in a separate opinion in which Mr. Justice Brandeis and Mr. Justice Stone concurred.

CITY DESTROYING A BUILDING NOT A NUISANCE, LIABLE FOR COMPENSATION

One McMahon, owner of a frame building in the city of Telluride, Colo., received a notice from the city directing him to repair or remove it. Complying with the notice, he removed it to the rear of the lot, so that it abutted the alley, and repaired and remodeled it so that it could be used as a private garage.

Certain officers of the city, under orders of the mayor and city council, destroyed the building on the theory that it constituted a nuisance.

McMahon contends that the building was not a nuisance within the meaning of the city ordinance which defined a nuisance, and the evidence tended to support his contention.

Mr. Chief Justice Allen of the Supreme Court of Colorado, in McMahon v. City of Telluride et al., 244 Pac. 1017, said in part:

"Abatement of nuisances is a governmental function. 28 Cyc. 1291. No liability can arise against a municipality for the destruction of property which is a nuisance, but it must be a nuisance in fact. 28 Cyc. 1292.

"Where the property is not in fact a nuisance, if the city is not liable in tort, because of the rule above mentioned and relied on by the city in the instant case, the municipality is nevertheless liable upon the theory that it must grant compensation for private property that it takes for public use.

"If certain property is in fact a nuisance, its destruction as such may not give rise to any right to compensation; but if property is destroyed under a mistaken belief that it is a nuisance, when in fact it is not a nuisance, it is taken for a 'public use' within the meaning of the constitutional provision and the loss to the owner should be made good."

WHEN YOU RUN YOU RUN YOUR OWN RISK

The McLeod Store of Madisonville, Ky., inserted in the afternoon newspaper an elaborate advertisement announcing a guinea race to be held in front of its store on the following Saturday. At the time and place designated a large crowd assembled.

When the guineas were released from the roof of the McLeod Store some flew to the street below and others lit on the telephone wires above the street. One of these, when dislodged, flew in front of a 17-year-old boy, who gave chase. When within reaching distance he stumbled and fell to the pavement, six or eight other contestants falling on him, breaking his leg. The fracture was serious, and the doctor experienced great difficulty in setting the limb. He suffered greatly and the usefulness of his limb was greatly impaired.

Justice McCandless of the Court of Appeals of Kentucky, in the case of McLeod Store v. Vinson, 281 S. W., 799, said in part:

"Without deciding the question, we may assume that an excited crowd chasing guineas for a series of prizes upon a congested city street would obstruct the street and cause inconvenience and some danger to travelers, and this would render the one causing such commotion liable to a person exercising due care in the proper use of the street for any injury inflicted upon him by the racers.

"It may also be assumed that plaintiff was not guilty of contributory negligence per se while engaged in the race. But a serious question to be considered is whether, under the facts stated, it should be held as a matter of law that he assumed the risks ordinarily attendant upon the race in which he entered. In this he was a voluntary participant. There was no danger whatever to him when standing in the courthouse yard, and, aside from joining in the race, he had no occasion to go upon the street or pavement.

"The anticipated danger was as obvious to him as it was to appellant. While not an adult, he was practically 17 years of age, of ordinary intelligence, and perfectly able to determine the risks ordinarily incident to such games. An ordinary boy of that age is practically as well advised as to the hazards of baseball, basketball, football, foot races, and other games of skill and endurance as is an adult, and, if injured while voluntarily engaged therein, stands on an entirely different footing from an infant of tender years, or from one who is injured while lawfully and properly using the highway. * * *

"It is clear that in entering the race he assumed the ordinary risks incident thereto, and is thereby barred of recovery in this action."

DIGEST OF IMPORTANT DECISIONS

The name of the state is printed in bold face type to enable you to select cases from any particular state. The cases from the National Reporter System are copyrighted by the West Publishing Co., St. Paul, Minn., from whom a copy of any such decision may be obtained for 25 cents.

ACCIDENT INSURANCE

Provision of accident insurance policy denying indemnity for loss of limb unless it occurred within 30 days after accident held not unreasonable or against public policy, in view of small premium paid and limited protection contemplated. Clark v. Federal Life Ins. Co., 136 S. E. 291, **N. C.**

APPEAL AND ERROR

Trial court held to have improperly granted injunction pending appeal from decree refusing injunction, since, although such appeal is authorized under Judicial Code, § 129, effect of granting injunction operates as securing relief denied on original application, which is abuse of discretion, in absence of peculiar circumstances warranting it. Liberty Nat. Bank v. McIntosh, 16 **F.** (2d) 906.

BANKS AND BANKINGS

When a depositor's passbook of a savings bank shows an entry of a payment of money by the bank, and the depositor testifies that the money shown by the entry was never paid to her, or to any other person by or with her authority, the burden of proving such payment is upon the defendant bank. Where the by-laws of a savings bank, as printed in the passbook of a depositor, provide that such entry of money is evidence of its payment, and that the bank will not be responsible for fraud practiced on depositors although the bank will at all times use the strictest caution to prevent fraud, it is incumbent on the bank to show that it used due care in the payment of the money and the strictest caution to prevent fraud, when the depositor claims that fraud was practiced and the money was paid without the depositor's knowledge or authority. Berndt v. Hoboken Bank for Savings in City of Hoboken, 135 Atl. 818, **N. J.**

BENEFICIAL ASSOCIATIONS

Strict rules of judicial procedure are not applicable to fraternal benefit lodge trials, and prejudice in minds of grand lodge officers constituting trial tribunal does not disqualify them so as to make order of expulsion from membership void. Grand Lodge, Colored K. P. v. Sanford, 289 S. W. 456, **Tex.**

CANCELLATION OF INSTRUMENTS

In cases of life insurance, where insured has died and claim has been made on policy, defense to policy on ground of fraud can be made in action at law, precluding suit in equity to cancel policy, which may, however, be maintained, if insured is alive; but insurer under accident and health policy, wherein insured's guardian is claiming monthly indemnity for total disability by reason of insanity, held to have adequate remedy at law, in that special finding of jury on claim for monthly payment would bar actions for later payments, and suit in equity to cancel policy on ground of fraud was thereby not warranted. Continental Casualty Co. v. Yerxa, 16 **F.** (2d) 473.

CHARITIES

Public charitable hospital, which on arrival of patient, agreed to keep and return her jewelry, held not liable for wrongful delivery thereof by its employee to impostor representing himself to be plaintiff's son-in-law. Rudy v. Lakeside Hospital, 155 N. E. 126, **Ohio.**

COMMERCE

Plaintiff's decedent was fireman on engine of work train which left Lafayette, Indiana, westbound and took two empty cars to gather railroad scrap ultimately destined to be taken by another train into Illinois. Work train loaded one car and had half-loaded other car when Indiana-Illinois state line was reached, at which point full car was set out to be taken into Illinois by later train. Work train, with same crew, then started east on return to Lafayette taking half-filled car, doing nothing on way back except operate train. Collision of work-train with a switch engine occurred on return trip, killing plaintiff's decedent. On a subsequent day the half-loaded car was fully loaded and ultimately taken to Illinois. Held, fireman was engaged in interstate commerce when killed. Wabash Ry. Co. v. Whitcomb, 154 N. E. 885, **Ind.**

CRIMINAL LAW

Motorcycle policeman had no right to stop and search automobile because it was traveling slowly and occupants looked at him as they passed, and liquor obtained in such search is inadmissible in prosecution for possessing and transporting liquor, notwithstanding that he demanded driver's license as subterfuge before searching car. People v. Roache, 211 N. W. 742, **Mich.**

Prosecution under anti-evolution law constituting "bizarre" case, entry of nolle prosequi should be made to conserve the peace and dignity of the state. Scopes v. State, 289 S. W. 363, **Tenn.**

In prosecution for driving automobile while intoxicated, defendant's character witness's testimony, upon cross-examination, that he had heard defendant was drunk on day of offense charged, held improperly admitted because its effect was by hearsay to establish condition upon which prosecution was based. Woodward v. State, 289 S. W. 407, **Tex.**

DIVORCE

In modifying alimony award, trial court was justified in considering husband's wish to remarry, and that he could not be so crippled in

his finances that another home could not be established, unless it appeared that necessities of former wife compelled such course. Lamborn v. Lamborn, 251 Pac. 943, **Cal.**

In husband's suit for divorce, instruction, that if defendant, within five years before filing of bill, committed two or more assaults on complainant with intent to do him bodily injury and did, on such occasions, inflict bodily injury she would be guilty of extreme and repeated cruelty, held proper. Teal v. Teal, 155 N. E. 28, **Ill.**

Reduction of alimony to wife rearing parties' two children, who were boys 16 and 17 years old, from $50 to $20 monthly, held proper, where husband had remarried, and had four small children by this marriage, and his net income had decreased to about $85 a month. Shattuck v. Shattuck, 251 Pac. 851, **Wash.**

EVIDENCE

In proceedings by one claiming to be son of intestate for determination of heirship, hearsay evidence of statements by deceased mother that petitioner, though born six months after marriage with first husband, was in fact son of intestate, whom mother subsequently married after divorce from first husband, held admissible as pedigree statement. In re Wright's Estate, 211 N. W. 746, **Mich.**

In action against manufacturer and retail dealer for death from poison in flour, evidence that another retailer, receiving a delivery from manufacturer on same day as defendant retailer, had sold flour to another person, the use of which caused illness in her family, held improperly admitted, in absence of showing of degree of care exercised by such second retailer while flour was in his possession. Hertzler v. Manshum, 211 N. W. 754, **Mich.**

EXECUTORS AND ADMINISTRATORS

Executor or administrator, who is lawyer, may be allowed fees to be paid law firm of which he is member, only if it was agreed that he is not to share in fees. Presumption is that executor or administrator, employing law firm of which he is member, shares in fees received by them from him In re Parker's Estate, 251 Pac. 907, **Cal.**

FOOD

In action for death from poisoned flour, coroner's certificate that death was due to pulmonary tuberculosis, together with evidence that such disease was contracted while decedent was in a weak and disabled condition due to illness caused by poison in flour, held sufficient to show cause of death and a causal relation between the alleged poisoning and the death, in view of Comp. Laws 1915, § 5607. Hertzler v. Manshum, 211 N. W. 754, **Mich.**

Food served at a restaurant does not constitute a "sale" either at common law or under the Uniform Sales Act. Nisky v. Childs Co., 135 Atl. 805, **N. J.**

FRAUDS, STATUTE OF

Instrument reciting receipt of deposit on real property located on certain street known by certain numbers, cost of property, and that deposit is to stand good until certain date, held insufficient as memorandum of sale, within statute of frauds, and could not be specifically enforced by purchaser. Finn v. Goldstein, 251 Pac. 964, **Cal.**

HOSPITALS

Where patient was admitted to hospital for observation and medical treatment, without any express provision for restraint or confinement, after unsuccessful attempts to commit suicide, and later disappeared, and was found dead, hospital was not liable under Death Act, for alleged negligence in permitting his escape; it owed no duty to restrain him. Tlohmann v. Riverlawn Sanatorium, 135 Atl. 817, **N. J.**

INJUNCTIONS

Where intent of parties in engaging in fraudulent practices in selling securities is to sell securities which are in fact worthless, or worth substantially less than asking price, intentional misstatements need not be alleged, material misrepresentations, intended to influence bargain, being enough, under Blue Sky Law. People v. Federated Radio Corporation, 154 N. E. 655, **N. Y.**

Mandatory injunction to remove business building, erected by defendant lessee in violation of restrictive covenant, subject to which defendant lessor took title, denied for want of equity, though defendants proceeded with full knowledge of facts and notice of plaintiff's claim, where they had good reason to doubt whether equity would enforce it because of change in condition of neighborhood and short remaining life of covenant. Forstmann v. Joray Holding Co., Inc., 154 N. E. 652, **N. Y.**

INSURANCE

Where owner of barge in tow expressly relieved charterer from liability for damages coverable by hull insurance, it could not hold steamers demised to same charterer responsible for such damages, and underwriter who paid owner under hull policy stood in no better position than owner. The Dutchess, 16 **F.** (2d) 1003.

Where a life policy was not issued in accordance with the application, but a different contract was delivered to the applicant, who retained the same, paying annual premiums thereafter, but without any express acceptance, a court cannot construe the facts as creating a contract in accordance with the application, but it must be held that applicant accepted the substituted contract, or that the minds of the parties did not meet in any contract. Peet v. Peoria Life Ins. Co., 16 **F.** (2d) 928.

INTERNAL REVENUE

Within Revenue Act 1918, § 214a (6), allowing deduction from gross income of losses of property from "fires, storms, shipwrecks, or other casualty," damage from wreck of automobile overturning on icy road is one from "other casualty," analogous to shipwreck. Shearer v. Anderson, 16 **F.** (2d) 995.

JUDGMENTS

Judgment on merits of court of province of Quebec, having jurisdiction of action and of defendant, not tainted by fraud, or with offense against public policy of New York, is conclusive

in this state, notwithstanding laws of Quebec make foreign judgments only prima facie proof of liability; question being one of private rights, and not public relations or comity. Cowans v. Ticonderoga Pulp & Paper Co., 219 **N. Y.** Supp. 284.

MANDAMUS

Where mandamus issued against commissioner of public works of city to reinstate city employee, in employment, plea in abatement setting out that officer against whom writ was sought was no longer commissioner must be sustained, and motion to substitute his successor in office must be denied. Tymon v. Commissioner of Public Works, 155 N. E. 3, **Mass.**

MARITIME LIENS

Grant of right to sue in admiralty does not confer a maritime lien, as appurtenant to that right; hence Jones Act, § 33, gives injured seaman no lien on ship for damages. The Pinar Del Rio, 16 **F.** (2d) 984.

MASTER AND SERVANT

The duties of an employer to furnish his workmen with reasonably safe appliances and to make proper inspection of them from time to time are imposed on him by law, and are absolute and nondelegable. The fact that a quantity of appliances are furnished by an employer, and that a defective one, by which a workman is injured, was selected by a fellow servant, will not relieve the employer from liability. J. R. Hanify Co. v. Westberg, 16 **F.** (2d) 552.

In action for death of fireman, caused by collision between moving train which deceased was firing and engine engaged in switching cars, fireman held not guilty of contributory negligence as matter of law, though automatic block signals past which fireman's train moved showed red on side of engine where fireman was stationed, where jury might reasonably infer from place where fireman was found in wreck that he was at time of collision engaged in firing, and therefore not on fireman's seat in engine. Wabash Ry. Co. v. Whitcomb, 154 N. E. 885, **Ind.**

MOTOR VEHICLES

Evidence held to take to jury question whether automobile was being operated by son at request and "on business" of father, who owned it, where son took sisters and friends to go skating after asking father's permission. Zeidler v. Goelzer, 211 N. W. 140, **Wis.**

Where defendant had driven car past semaphore with stop sign and backed machine, following signal from traffic officer, thereby running into plaintiff, jury was authorized to find for defendant, on evidence that he requested occupant of rear seat to look in rear and occupant notified him that path was clear. Grimes v. Thompson, 289 S. W. 290, **Ky.**

Truck driver approaching street intersection performs his duty if he looks sufficiently far to his right to discover that no traffic is approaching from that direction within distance that would be traversed at lawful speed, and is not required to look as far as his eye can reach, and during entire time of crossing. Taxicab Co. v. Ottenritter, 135 Atl. 587, **Md.**

MUNICIPAL CORPORATIONS

In assessment of property specially benefited by street paving, that street formed part of state highway running through city and therefore carried large amount of through traffic held not reason why more substantial part of cost thereof should be borne by municipality than was assessed by viewers. In re West Market St., 135 Atl. 633, **Pa.**

Exercise of powers by city officers in excess of their authority for great length of time will raise no presumption of grant to city of such power. Haub v. Tuttle, 251 Pac. 925, **Cal.**

City of New York held liable for failure of Public Service Commission's engineer to act with promptness in supervising construction of subway, resulting in delay and loss to contractor, since city undertook by contract that engineer should perform duties in accordance with it. Litchfield Const. Co. v. City of New York, 155 N. E. 116, **N. Y.**

Where merchants conducting stores on street paid person to sprinkle street for purposing of laying dust, and sprinkling was done in freezing weather so that smooth ice formed on street, and city had actual or constructive notice of the practice and did not prevent it, and plaintiff was riding bicycle on the street where pavement sloped towards curb and bicycle slipped on the ice thereby causing injury to plaintiff, held, case for jury against city. City of Chickasha v. Daniels, 251 Pac. 978, **Okla.**

City is not liable for injuries, caused by wheel of automobile going into hole in ice on street, in absence of proof that highway, independent of the ice, was defective. Dowd v. City of Boston, 154 N. E. 923, **Mass.**

In action for personal injuries from fall on icy sidewalk, evidence that plaintiff knew of the dangerous condition and fell and was injured while attempting to sprinkle ashes over ice held not to warrant ruling, as matter of law, that plaintiff could not recover from abutting owner because of voluntary exposure to injury. Lucas v. Byrne, 154 N. E. 920, **Mass.**

NEGLIGENCE

In action against storekeeper for injuries to infant customer resulting from inserting his finger in spout of electrically operated coffee grinder, defendant held not liable, in absence of evidence indicating that coffee grinder was not adequately protected, or that protection was necessary. Connelly v. Carrig, 154 N. E. 829, **N. Y.**

Contractor's employee cleaning windows, who continued at work though some of windows were without hooks, assumed risk of injury from falling. Building owner held not liable at common law for death of contractor's window washer falling from window not equipped with hooks for safety belt. Dougherty v. Pratt Institute, 155 N. E. 67, **N. Y.**

Unlocked gasoline-drip on natural gas pipeline, located on defendant's premises near path and playground used by children, held attractive nuisance where evidence showed small children could and did open valve of drip and cause escape of gas and spray of gasoline, whereby in-

fant plaintiff's clothes were saturated and later ignited causing injuries. Shaffer Oil & Ref. Co. v. Thomas, 252 Pac. 41, **Okla.**

PARENT AND CHILD

Act of minor child during play, in revolving rubber casing against another child, was not result of weak or vicious mind so as to make parent legally liable for resulting damages. Ringhaver v. Schlueter, 155 N. E. 242, **Ohio.**

PENSIONS

Adjusted service Certificate issued under World War Adjusted Compensation Act of 1924 (43 Stat. 121) held, gratuity in nature of pension, so that suit thereon is not within District Court's jurisdiction. Williams v. U. S. (U. S. Dist Ct. Penn. Mch. 8, 1927), **Fed.**

PRINCIPAL AND AGENT

Where original holder of bond and mortgage secured papers from assignee and forwarded them to attorney with blank indorsement in response to attorney's request that papers be forwarded to bank to be taken up, he thereby created such attorney his agent, and is therefore liable for attorney's fraud in subsequently selling bond and mortgage for full amount apparently due thereon. Davis v. Blank, 136 S. E. 300, **S. C.**

Representation by iron manufacturer's agent that, if siphon for irrigation was constructed under manufacturer's supervision, it would withstand any pressure, held promissory, and, even if it gave cause of action against manufacturer for breach of contract, gave no cause of action against agent. Hidalgo County Water Improve. Dist. No. 4 v. Western M. Mfg. Co., 16 **F.** (2d) 893.

PROSTITUTION

In prosecution under Mann Act, for transporting married woman in interstate commerce for immoral purposes, refusal to instruct acquittal, if accused believed he could marry woman in Montana and intended to do so before cohabiting with her, held error. Drossos v. United States, 16 **F.** (2d) 833.

RAILROADS

Even if one's purpose in going to railroad station is merely to obtain time-table, he has rights of an invitee. Levesque v. American Ry. Express Co., 155 N. E. 25, **Mass.**

Where automobile driver, with knowledge of the existence of a railroad crossing at grade, so drove his automobile that when, upon discovering a freight train standing upon the track, "he swung his wheels to the left, and the rear end of the automobile swung around and caught between two freight cars, the train then started and dragged him off the road into the ditch," the railroad company having no knowledge of his presence, such accident occurring at night, in a dense fog, when "it was very hard to distinguish objects ahead," and, by reason of an automatic signal not being in operation, he was unable to tell just the exact location, or that the road was blocked and that a train was on the crossing, he is guilty of contributory negligence per se, even though automatic warning signals located at such crossing were not working, nor other warnings given by the railroad company. Toledo Terminal R. Co. v. Hughes, 154 N. E. 916, **Ohio.**

RECEIVERS

Appointment of receiver for reciprocal automobile insurance exchange held void, such exchange being merely a place where subscribers for insurance exchanged their contracts of indemnity through their attorney in fact, and not a corporation or other legal entity, in view of the terms of the applications for insurance, of the contracts for insurance, and of the powers of attorney, notwithstanding Reciprocal Insurance Act, providing that subscribers shall adopt a name by which they may be designated as a body. Turner v. Henshaw, 155 N. E. 222, **Ind.**

REMOVAL OF CAUSES

In action by administrator of deceased employee against employer and its superintendent, alleging breach of master's nondelegable duty to furnish employee reasonably safe place and tools for work, superintendent was vice principal of master, responsible for manner in which duty was discharged, and was properly joined as party defendant as regards right to remove cause to federal court, though defendants could have been sued separately. Crisp v. Champion Fibre Co., 136 S. E. 238, **N. C.**

Suit by resident purchaser against non-resident seller and seller's resident salesman based upon sale alleged to have been induced by the false representations of the salesman, held removable, where the salesman's representations were promissory so that he was not liable therefor. Hidalgo County Water Improvement Dist. No. 4 v. Western Metal Mfg. Co., et al., 16 **F.** (2d) 893.

SCHOOLS AND SCHOOL DISTRICTS

Rule of board of education excusing pupils at request of parents for half hour each week to attend religious instruction outside of school held not violative of Education Law, requiring regular attendance of pupils for entire time during which school is in session; such absences not amounting to "irregular attendance;" and held not to violate prohibition of Const. article against using public property or money in aid of denominational schools. People ex rel. Lewis v. Graves, 219 **N. Y.** Supp. 189.

SEAMEN

In action against United States Shipping Board Emergency Fleet Corporation as owner of ship, and another as operator, for death of seaman, who died at Accra, Gold Coast, Africa, the trial court properly held that death statute of the District of Columbia, where Fleet Corporation was domiciled, controlled. United States Shipping Board Emergency F. Corp. v. Greenwald, 16 **F.** (2d) 948.

SHIPPING

Limitation that steamer should not be liable for breach of passenger transportation contract unless suit was commenced within 90 days after action arose, or unless within 15 days after notice of claim and facts were presented in writing to master of ship, held not unreasonable. Henderson v. Canadian Pac. Ry. Co., 155 N. E. 1, **Mass.**

SPECIFIC PERFORMANCE

Contract to take child by adoption and as apprentice, reciting intention to receive apprentice as adopted child and requiring yearly information as to welfare of apprentice, is primarily intended as contract of apprenticeship and cannot be specifically enforced to compel adoption so as to clothe child with rights to property as natural born child. Sisson v. Irish, 155 N. E. 168, **Ohio.**

STREET RAILROADS

In action for damages to automobile from collision with electric car, motorman's testimony that he saw car when 45 feet from place of collision, immediately applied air, and reversed car but was unable to stop, due to sloppy condition of track, held sufficient to go to jury on question of negligence in speed at which car was being driven. Perry v. Eastern Massachusetts St. Ry., 154 N. E. 550, **Mass.**

THEATERS AND SHOWS

The complaint in a personal injury action averred that plaintiff was caused to fall and suffer injuries in a place of public amusement by reason of the excessive application to the floor of wax which adhered to her shoes in such manner as to enhance the danger of slipping and rendered the floor highly unsafe and dangerous. There are other allegations which may render the whole equivocal, but in view of the liberal construction to be applied, the complaint is good as against a general demurrer. Doerfer v. North Side Spiritual Church of Minneapolis, 211 N. W. 678, **Minn.**

TRIAL

In beneficiary's action on insurance policy, argument "he (insured) did his duty in the war, he did his duty in the church, and he did his duty as a citizen. I ask you, gentlemen, to deal with the case with that in mind, and say, 'We stood by you,' and if you look beyond in the blue you will see another army of the dead, and (insured) will be one of them, and you can say to him, 'We have found the truth, we have protected you, so that you and I, standing mute, salute,'" held not improper. Glass v. Metropolitan Life Ins. Co., 154 N. E. 563, **Mass.**

Instruction on burden of proof that "If the testimony is such that you cannot determine where the preponderance of the testimony is, in that event you would find for the defendants," held erroneous as amounting to charge that if members of jury could not agree on which side preponderance of evidence was, jury should return verdict for defendants. Talton v. Richardson, 136 S. E. 526, **Ga.**

VENDOR AND PURCHASER

In trespass to try title, defendant held not an innocent purchaser where he failed to make inquiry of tenant in possession when such inquiry would have disclosed that tenant held under plaintiff, the holder of prior unrecorded deed; notwithstanding that plaintiff rented land to tenant before receiving deed, being considered then agent for undisclosed principal. Pondrom v. Gray, 289 S. W. 79, **Tex.**

Where one purchases land on agreement that notes assumed are to be paid "on or before," it is not a substantial compliance with contract to make them payable on fixed, definite date from one to three years distant, or after 30 days' written notice to holder. Burks v. Neutzler, 289 S. W. 436, **Tex.**

WITNESSES

Where state's witnesses denied having made statements that they purchased liquor from defendant, admission of hearsay testimony that witnesses had made such statements held error; the evidence sought to be impeached being purely negative. State v. Phillips, 251 Pac. 864, **Wash.**

Court did not err in excluding signed written declaration of facts, denied by witness and offered to impeach him, where neither the party who wrote statement nor any one else testified that declaration contained true account of what witness said. Altieri v. Public Service Ry. Co., 135 Atl. 786, **N. J.**

WORKMEN'S COMPENSATION

Mother's obligation to support minor son after abandonment by father being absolute, whether son earned wages or not, spending money given him from wages turned over to her, as well as half thereof for room and board, were items of maintenance, not deductible from his wages in determining extent of her dependency on him. Draus v. International Silver Co., 135 Atl. 437, **Conn.**

Where employer furnished auto transportation to and from servants' place of work, injury to employee while riding back from work held compensable under Alabama Statute, as injury arising in "course of employment," because incident to and part of relation of master and servant, though statute provides injuries arising out of course of employment cover only those sustained on or about premises where services are performed. Jett v. Turner, 110 So., 702, Ala.

A laborer, hired in the open market at a stipulated sum per hour to aid in removing a fall of snow from railroad tracks subject to discharge at any time and in any event when the snow should be cleared, held to be under casual employment, and not within Workmen's Compensation Act. Thompson v. Wagner, 135 Atl. 800, **N. J.**

Under Workmen's Compensation Law, providing that awards for injuries subject to admiralty may be made under statute where claimant, employer, and carrier waive admiralty rights and remedies, "waive" imports concurrent evidence of intention having force of agreement to forego one set of remedies and abide by another, and until that intention is announced by all, waiver by any one is inchoate and revocable. Fitzgerald v. Harbor Lighterage Co., 155 N. E. 74, **N. Y.**

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